

Baykeeper's Deltakeeper Chapter  
California Coastkeeper Alliance  
Natural Resources Defense Council  
California Sportfishing Protection Alliance  
Watershed Enforcers

23 August 2005

Mr. Robert Schneider, Chair  
Mr. Thomas R. Pinkos, Executive Officer  
Mr. Bill Croyle, Supervising WRCE, Irrigated Lands  
Ms. Wendy Cohen, Sr. WRC Engr.  
Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center, No. 200  
Rancho Cordova, CA 95670-6144

Via Facsimile: Hardcopy to Follow

Re: Amendments to Resolution No. R5-2003-0105 Conditional Waivers of Waste  
Discharge Requirements for Discharges from Irrigated Lands Within the Central  
Valley Region Attachment A2

Dear Messrs. Schneider, Pinkos, Croyle and Ms. Cohen:

We submit these comments on behalf of Baykeeper and its Deltakeeper Chapter, California Coastkeeper Alliance, Natural Resources Defense Council, the California Sportfishing Protection Alliance and Watershed Enforcers (hereinafter Deltakeeper Chapter). Thank you for this opportunity to comment on the tentative amendments clarifying the tributary rule. While we acknowledge the necessity of complying with the Court's direction, the hasty approach put forward by staff raises serious questions of policy and law and opens wide-ranging issues that will clearly have unintended consequences.

The proposed amendments seek to alter the Board's longstanding interpretation of the tributary rule and to significantly alter presently established beneficial uses. This new interpretation will cast into doubt the beneficial uses of thousands of Central Valley waterways. Further, the Irrigated Lands Unit has rushed to effect this modification of the tributary rule without considering how the new interpretation will affect its workload or impact other Regional Board permitting units (i.e., NPDES, Dairy, stormwater, etc.). We believe this hasty action will result in tremendous new burdens on board staff, sow confusion and directly undermine the Board's authority to regulate pollution and unnecessarily weaken the Irrigated Lands Waiver.

In addition, the Board seeks alter established beneficial uses and to accomplish this significant policy change without the appropriate and legally required hearing procedures and environmental review process normally associated with Basin Plan amendments and changes in beneficial uses. We believe such a drastic change in policy warrants greater scrutiny and more careful thought. This new interpretation of long-standing application of the tributary rule must undergo a formal CEQA and Basin Plan review process. These processes must explicitly identify the specific waterways and beneficial uses that will be modified and lay out the procedures, timelines, costs and responsibilities associated with these modifications.

Although the proposed amendment purports to clarify the application of the tributary rule, in practice it will create nothing but confusion. For example attachment A2 defines “constructed agricultural drains” as waterways conveying agricultural drainage where no natural water bodies existed prior to construction activities. This definition fails to make clear whether this includes or excludes water delivery systems distributing irrigation water. At a minimum such irrigation systems have irrigated agricultural beneficial uses and are “waters of the United States” under governing Ninth Circuit precedent. *Headwaters, Inc. v. Talent Irrigation District*, 243 F3d 526 (9th Cir Mar. 12, 2001). Moreover, the definition fails to make clear whether drainage systems that contain commingled mixtures of agricultural drainage and discharges from other regulated activities (i.e., dairy or municipal discharges, runoff from highways, right-of-way chemical applications, etc.) are included in the definition.

There are now large expanses of the Central Valley that historically contained networks of natural drainages that have subsequently been replaced with channelized and constructed drainage and water distribution systems. For example, examination of the Eastside waterways between the Tuolumne and Merced Rivers reveals that virtually all are now referred to as canals or laterals. Historically, this area contained numerous natural drainages that are now replaced with constructed drains and channels. The proposed amendment (in Footnote 1 to Attachment A2) seems to indicate that constructed/channelized systems that have replaced natural drainages will be considered “streams.” However the amendment does not set forth the details of the investigation and decision-making process that Regional Board staff will employ in determining whether specific constructed drains are constructed drains or, in reality, streams. The amendment does not explain how many such inquiries will be necessary or what the expected workload will be.

Federal law requires that fishing and swimming beneficial uses be protected in waters of the United States and that the 9<sup>th</sup> Circuit has held that irrigation canals are waters of the United States if they exchange waters with natural creeks and other waters of the U.S. *Headwaters, Inc. v. Talent Irrigation District*, 243 F3d 526 (9th Cir Mar. 12, 2001). Since the beneficial uses of “constructed agricultural drains” will no longer be determined by the tributary rule, the Regional Board must specifically and formally identify the beneficial uses of constructed drains and include those uses in the Basin Plan. The proposed amendments utterly fail to make clear how the Board will comply with this

legal requirement. Moreover, until the tributary rule designations of “constructed agricultural drains” are replaced with new designations in the Basin Plan it will be impossible for the Board to maintain consistency in its beneficial use designations between different permitting sections of the Board (i.e, NPDES, stormwater, irrigated lands waiver, 401 certifications, TMDLs, etc.).

Likewise, all surface waters are considered, pursuant to State Board Resolution 88-63, to be sources of drinking water having municipal beneficial uses, with several exceptions. One relevant exception is for systems designed or modified for the primary purpose of conveying or holding agricultural drainage water if discharges from such systems are monitored to assure compliance with all relevant water quality objectives. It is clear that few if any of the “constructed agricultural drains” carved out of the tributary rule by this amendment have been (or will be) monitored as required by resolution 88-63. Thus, these waters currently (and for the foreseeable future will) have drinking water as a beneficial use. The proposed resolution does not make clear whether it intends to alter this beneficial use designation. Nor does the proposed amendment specify how and when the Regional Board plans to implement such a monitoring program for those systems for which the use is removed. It should be noted that such a monitoring program would reach far beyond the monitoring requirements presently contained in the Irrigated Lands Waiver.

The amendment also threatens to make the receiving water limitations set forth in the Irrigated Lands Waiver completely unworkable. The proposed amendment states in Attachment A2, No. 4 that receiving water limitations protecting beneficial uses will require a determination of the uses applicable to receiving water bodies. This seems to indicate that these receiving water limitations will not apply until the Regional Board makes a specific determination with respect to a particular constructed agricultural drain. This result will vastly complicate administration and enforcement of the waiver by the Board. The proposal provides no guidance regarding when and how these determinations will occur so that applicable receiving water limitations will be triggered. Nor does the document specify who will make the decision on beneficial uses by using “the other methods” of determining beneficial use. Perhaps most troubling, the document does not describe what will happen in absence of such a determination.

Attachment A2, No. 4 also states “[t]herefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also **ensure** that their discharges do not impact the beneficial uses of any downstream water bodies.” Emphasis added. How does the Regional Board propose to enforce the requirement that dischargers “ensure” that their discharges do not impact downstream beneficial uses? Especially, as this requirement goes far beyond elements contained in the present Irrigated Lands Waiver.

Finally the proposed resolution claims that the proposed amendments do not constitute substantial changes to the project that would require a subsequent or supplemental EIR or negative declaration. We strenuously disagree. The reinterpretation of the tributary rule is likely to significantly affect the beneficial uses and the water

quality standards that will apply to protect uses in an unknown number of unidentified waterways. It will also affect an unknown number of permits issued by other Regional Board units that have relied upon the previous interpretation of the tributary rule.

An environmental document must be prepared that analyzes the specific water bodies that will be affected, existing beneficial uses that will be eliminated, the proposed time schedule under which reevaluations will occur and how the Board proposes to identify beneficial uses of constructed agricultural drains and acquire the necessary resources needed to conduct required use attainability analyses. The assessment must also evaluate how this reinterpretation affects other Regional Board permitting units that have employed the previous interpretation of the tributary rule in issuing permits.

In closing, the Irrigated Lands Unit in responding to a need to answer a question by the Court, has short-circuited due process and hastily proposed changes in the tributary rule without identifying the specific effects on specific waterways or considering how those changes will affect other Regional Board permitting units that regulate discharges of wastes to surface waters. This approach portends a blizzard of controversy, litigation and unintended consequences. It and the proposed resolution also contravene numerous specific environmental review and due process requirements contained in CEQA, the Clean Water Act and Porter-Cologne.

We would urge the Board to reaffirm its long standing interpretation of the tributary rule as applicable to all tributaries including constructed agricultural drains. If the board is determined to change the beneficial uses of these streams, prudence would suggest that the Board embrace a more measured approach; first identifying the specific water bodies and beneficial uses at issue and then establishing the procedures, including time schedules and identification of required resources and responsibilities, necessary to accomplish the task without sacrificing water quality protection or leaving numerous water bodies in limbo without beneficial uses until some uncertain future.

Thank you for considering these comments. If you have questions or require clarification, please contact me at 209-464-6368.

Sincerely,

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